

UNITED STATES OF AMERICA  
UNITED STATES COAST GUARD vs.  
MERCHANT MARINER'S DOCUMENT NO. Z2576040  
LICENSE NO. 471178, Operator  
Issued to: Joseph W. HOMER

DECISION OF THE COMMANDANT  
UNITED STATES COAST GUARD

2112

Joseph W. HOMER

This appeal has been taken in accordance with Title 46 United States Code 239(g) and Title 46 Code of Federal Regulations 5.30-1.

By order dated 16 December 1976, an Administrative Law Judge of the United States Coast Guard at Boston, Massachusetts suspended Appellant's license for six months on twelve months probation upon finding him guilty of negligence. The specification found proved alleges that while serving as Operator on board the United States Tug HUDSON under authority of the license above captioned, on or about 23 August 1976, Appellant navigated his tow in a negligent manner such as to cause his tow to come in contact with the Long Island Bridge.

At the hearing, Appellant was represented by professional counsel and entered a plea of not guilty to the charge and the specification.

The Investigating Officer introduced in evidence CG Form 2692 Tug HUDSON, O.N. 249639, C.G. Form 2692 - Crane BARGE NO. 6, and a copy of U. S. Department of Commerce National Oceanic and Atmospheric Administration, National Ocean Survey Chart No. 13270 39th Ed., 1 March 1975 of Boston Harbor. LT William MILLER, USCG, the casualty investigation officer, testified for the Investigating Officer.

In defense, Appellant offered in evidence his own sworn testimony.

At the end of the hearing, the Judge rendered a written decision in which he concluded that the charge and specification had been proved. He then served a written order on Appellant through his attorney suspending his license for a period of six months on twelve months probation.

The entire decision and order was served on 17 December 1976. Appeal was timely filed on 10 January 1977.

### FINDINGS OF FACT

On 23 August 1976, Appellant was serving on board the United States Tug HUDSON and acting under authority of his license while the tug was towing Crane BARGE NO. 6 in Boston Harbor, Massachusetts. Further findings of fact are not made in view of the disposition to be made of this case.

### BASES OF APPEAL

This appeal has been taken from the order imposed by the Administrative Law Judge. It is urged that:

The Coast Guard has no jurisdiction over his license since he was not serving as the Operator of the tug, and there was a lack of negligence by the Appellant at the time of the collision.

APPEARANCE: Mr. Lawrence J. HOCH and Mr. Jerome V. FLANAGAN,  
Esq. KISLOFF, HOCH, SHUMAN & FLANAGAN Boston, Mass.  
by F. Dore HUNTER, Esq.

### OPINION

The basis problem with this case is the state of the record, at the close of the hearing, on the issue of whether the Appellant was the operator of the tug on the date of the casualty. The Government evidence on this point consisted of the testimony of the casualty investigating officer, LT MILLER, regarding admissions made to him by Appellant on the date of the casualty, and the Casualty Report Forms (CG 2692) submitted by Appellant as required by law. The Administrative Law Judge admitted this evidence in violation of the regulatory prohibition contained in 46 CFR 5.20-120. That regulation states, "No person shall be permitted to testify with respect to admissions made by the person charged during or in the course of a Coast Guard investigation except for the purpose of impeachment." This prohibition has been held to apply to the statements by the person charged contained on a Casualty Report Form (CG-2692). Commandant's Appeal Decision No. 1913 (Golding). The Administrative Law Judge recognized his error after he closed the hearing but attempted to cure it by excluding the evidence from his consideration.

While it may be permissible in many cases for an Administrative Law Judge to cure erroneous decisions in this manner; in this case, the admitted evidence constituted the entirety of the Government's case. Both parties to the proceeding were under the impression that it was part of the record, and the post-hearing exclusion worked a fundamental and drastic change to the posture of the hearing as it existed at the time of closing.

Rather than proceeding to a decision on the basis of this completely changed record, the Administrative Law Judge should have reopened the hearing, informed the parties of the error, excluded the evidence, and inquired of the parties how they wished to proceed.

#### CONCLUSION

The errors below by the Administrative Law Judge in admitting evidence and then excluding it post hearing without reopening the hearing worked such a drastic and fundamental change to the record in this case as to warrant setting aside the findings and conclusions and a return for a reopening of the hearing.

#### ORDER

The order of the Administrative Law Judge dated at Boston, Massachusetts on 16 December 1976, is VACATED. The findings are SET ASIDE, and the case is REMANDED for reopening of the hearing.

E. L. PERRY  
Vice Admiral, U. S. Coast Guard  
Acting Commandant

Signed at Washington, D. C., this 14th day of November, 1977.

## INDEX

### Evidence

Improper to exclude previously admitted  
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Improper exclusion, effect on record and findings of  
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